No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1960

MIKE MILANOVICH ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (R. 338–351) is reported at 275 F. 2d 716.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1960 (R. 351–352). On April 4, 1960, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to May 7, 1960 (R. 353). The petition was filed on May 6, 1960, and was granted on June 20, 1960 (R. 353). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction and sentencing for both larceny of, and receiving, the same property was properly corrected in the court of appeals by the vacating of the five-year sentence for receiving, leaving the ten-year sentence for larceny in effect.

2. Whether the trial court's refusal to instruct witnesses excluded from the court-room not to discuss their testimony was prejudicial error.

STATUTE INVOLVED

18 U.S.C. 641:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
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> * * * * *

STATEMENT

The petitioners (who are husband and wife) were convicted in the District Court for the Eastern Dis-

trict of Virginia of the theft of more than $14,000 in currency from a commissary store of a United States naval base—a violation of 18 U.S.C. 641 (Count 2). Petitioner Virginia Milanovich was also convicted of receiving and concealing the stolen currency (Count 4).[1]

Mike Milanovich was sentenced to 5 years' imprisonment on the larceny count (R. 10). Virginia Milanovich was sentenced to 10 years' imprisonment on the larceny count and 5 years on the receiving count, the terms to be served concurrently (R. 11–12). On appeal, the larceny convictions were affirmed, but the court of appeals vacated the sentence of Virginia Milanovich for receiving stolen property, Chief Judge Sobeloff concurring in part and dissenting in part (R. 341–342, 351–352).

1. THE EVIDENCE

The government's evidence may be summarized as follows:

Prior to the larceny, Mike Milanovich, a Chief Petty Officer (R. 44–45), took Benjamin Guerrieri to the commissary of the naval base, telling him to view the safe, so that they would know what equipment they needed (R. 93). On May 29, 1958, and at other times, Mike Milanovich, Guerrieri, Clayton Grimmer, and Christ Sofocleous purchased tools from local stores and stored them in Milanovich's shed (R. 24, 26, 31, 35, 45–48, 52–53, 88–89, 110–111, 153–154).

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[1] The petitioners were acquitted on counts 1 and 3 relating to another theft.

On June 1, 1958, before or at about midnight, the petitioners and the three accomplices drove to the naval base in the Milanovich car. The three accomplices broke into the commissary building and rifled the safe, the operation taking until nearly daybreak (R. 93–94, 118, 130–131, 133–134, 143–144, 158–159, 224–225). A meeting place had been prearranged in case the petitioners were not present when the others emerged, but the petitioners failed to appear at the rendezvous. The others buried the money in the woods close by and proceeded to another predesignated place, outside the base, where they were subsequently picked up by Virginia Milanovich and another woman, Millie Gauger (R. 94–96, 118–119, 135, 144–147, 224–225, 228). Shortly thereafter, Virginia Milanovich drove Guerrieri back to the base for the money, but the money was not retrieved because there were "too many people around" (R. 96, 136; and see R. 58–60). That afternoon the petitioners and the three accomplices, in the guise of a fishing party, returned to the base for the money but did not retrieve it because of "activity" on the base (R. 96; and see R. 54–55). The accomplices testified that they never received any of the money (R. 97, 130, 136, 227).

On the night of June 18, 1958, Virginia Milanovich and Grimmer went to the base to get the money (see R. 98–99). Grimmer and Millie Gauger stayed at the Milanovich house that night (R. 287). Early the next morning, F.B.I. agents went to the Milanovich home, and with the permission of Mike Milanovich searched the house (R. 64, 73, 77, 98–99). They found a suitcase which contained silver currency

totaling $501.60 and two loaded revolvers, and a lady's bag which contained $498.20 in silver currency (R. 64, 73–74, 76). Virginia Milanovich told an F.B.I. agent that she could give no explanation as to where the money had come from, although when confronted with her overnight bag she first stated that it belonged to Millie Gauger (R. 279–280, 287).[2]

2. THE CHARGE AND THE SENTENCE

The trial judge sustained the motion for acquittal of Mike Milanovich with respect to the receiving count here involved (Count 4), saying (R. 300):

> * * * Now, as I will explain to you later, that does not exonerate, nor does it convict Mike Milanovich of the charge of participating in the theft of that money, that is, in the sense that he may have been, and I do not suggest to you that he was, an aider and abetter in the theft of the money, but as will be explained to you later, there is a distinction between the theft of the money and being an aider and abetter in the theft of the money and the charge of receiving, concealing and retaining, with intent to convert to your own use or gain; and as I see it, the only evidence that could possibly

[2] In the latter part of June, 1958, in the presence of Mike Milanovich, Guerrieri, Milanovich's sister, and others, Virginia Milanovich accused Grimmer's wife Donna of having alerted the F.B.I. for the search of June 19 (R. 98–99). Mike and Virginia Milanovich urged that Guerrieri, who was already implicated and free on bond, and Grimmer, who had confessed, take the entire responsibility for the offenses, in return for compensation (R. 99). In addition, Virginia Milanovich threatened to kill Donna Grimmer if her husband testified against Mike Milanovich (R. 69).

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> implicate Mike Milanovich on the charge of aiding and abetting and concealing with respect to—aiding, abetting, the receipt, concealment and retention of the money taken from the Little Creek Amphibious Base would be the fact that it was found in a home occupied by him and that he slept there for a few hours that early morning of June 19th. * * *

The judge's charge to the jury also included the following (R. 304, 307):

> * * * [T]here is no evidence of the fact that either Mike Milanovich or Virginia Milanovich actually opened any safe or actually removed any of the contents of any safe, and so, as I will explain to you shortly, the question of their guilt, if any, * * * must rest upon whether the fact these two defendants or either of them participated as aiders and abetters in the commission of a crime * * *. [I]f they did participate as aiders and abetters, then they may be found guilty as principals. * * *
>
> Now, the third count * * * states a separate charge, that is, that these defendants did unlawfully receive, conceal and retain with intent to convert to their own use or gain, knowing that the property had been stolen or purloined, this quantity of money. Now, of course, if they had actually removed the contents of the safe themselves, they cannot be guilty of receiving those same contents, but the evidence is clear in this case that neither Mike Milanovich or Virginia Milanovich actually had their hands on the safe or removed any money from any safe. There is no question about that. So, therefore, if they received any money—and I

do not suggest to you that they did or did not receive any money—they must have received it from some other party, and then we go into the discussion of whether or not they received, concealed or retained any portion of the money with intent to convert to their own use or gain and with knowledge of the fact that this money had been stolen or purloined.

And the fourth count is a similar count * * *.

* * * * *

* * * [M]ere knowledge that a crime is about to be committed is not sufficient to make one an aider and abetter, nor is it sufficient if a person, acting without knowledge of the fact that a crime was about to be committed or just had been committed, in some manner innocently aids or abets an individual. There must be present the combination of knowledge of the commission of the crime and some affirmative act, no matter how small, which assisted or aided in the commission of the crime.

* * * * *

When the trial judge asked for exceptions, if any, to the instructions, the petitioners did not raise the objections made at an earlier time to the possibility that receiving might be inconsistent with larceny under the circumstances disclosed by the evidence (R. 15, 22, 231, 296–297). They raised only general objections to the definitions of larceny and of circumstantial evidence (R. 315–317).

At the time of sentencing, the trial judge noted a relatively "favorable" report by the probation officer with respect to the personal life history of Mike Milanovich (R. 333). As to Virginia Milanovich,

However, he noted "a life of crime" both on her own admissions and on the record (R. 337), and imposed a 5-year sentence on Mike Milanovich and a 10-year sentence on Virginia Milanovich on the larceny counts, and a 5-year, concurrent sentence on Virginia Milanovich on the receiving count (R. 337).

3. THE RULING AS TO CAUTIONING OF WITNESSES

At the outset of the trial, the petitioners' motion that the witnesses be sworn "and excluded" was granted (R. 22–23). After the testimony of an F.B.I. agent, the petitioners' counsel stated, "Of course, I realize that it is difficult to control this, but we are requesting the Court, in your discretion, whatever you can do, to keep these witnesses, who have testified, from mingling with other witnesses" (R. 33). The trial judge responded that he could not police such a situation and that people would in any event find out the general nature of the testimony; that the "fine points of the questioning are the matters that, of course, are * * * the main purpose for separating witnesses * * *"; and that counsel could talk with witnesses, but would have no right to persuade them (R. 33). Counsel for the petitioners agreed, "All right, sir. You understand the problem" (R. 33).

Later, the petitioners requested the trial judge to instruct a witness that he was not to talk to anyone with respect to the case or his testimony (R. 50). The judge refused to give such an admonition, observing that the witnesses had been separated, but that he would not provide basis for mistrial applications upon each claimed disobedience of such an admonition

as that proposed,[3] and that counsel would be free to explore any genuine impropriety on cross-examination (R. 50–52).

Upon cross-examination of Guerrieri and Sofocleous, it appeared that they had talked together twice, in the presence of an F.B.I. agent (R. 109, 137). Guerrieri had had opportunity to speak with Grimmer a few times at the jail and sent two notes to him, and Guerrieri and Grimmer were brought to the court together and left together (R. 107–108). Guerrieri testified that the conversation was not related to the case "in so many words"—Grimmer asked "what [Guerrieri] was going to do" (R. 108). Grimmer characterized the talk and notes as "somewhat" related to the case (R. 226).

Grimmer, after the start of the case, talked with his wife about the case and the evidence. But his talks subsequent to her testimony (which was about the statements by Virginia Milanovich after the robbery and after Grimmer's arrest, *supra*, footnote 2, p. 5) were at the jail in the hallway outside the court, while in the custody of the United States Marshal (R. 215–216, 226).

The trial judge, at the close of the trial, determined that there was no showing of prejudice warranting the grant of a motion for a mistrial (R. 297–298).

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[3] The trial judge noted, at a later point, that there were some 50 witnesses who testified, and perhaps 15 or 20 more who did not testify (R. 298).

SUMMARY OF ARGUMENT

I

The petitioners' first contention relates only to Virginia Milanovich, who was convicted of larceny in aiding and abetting the three persons who actually broke open the safe and hid the money. She was also convicted of receiving and concealing some of the money. The court of appeals vacated the sentence on the receiving and concealing count. She now complains that the larceny conviction should be set aside and a new trial granted because the jury, not having been instructed that she could not be guilty of both larceny and receiving stolen property; had no chance to choose between the two offenses.

It is the government's position that the jury's finding of guilt of receiving and concealing, and the imposition of sentence on that ground, was additional to, and independent of, the finding of guilt as to the larceny, and that the reversal of that count in no way affects or invalidates the finding of guilt of larceny.

A. The trial judge instructed the jury extensively and independently as to the offense of aiding and abetting larceny. The testimony amply established the participation by Virginia Milanovich in enabling the three safecrackers to enter the naval base and to escape. No impairment of the instruction on larceny was caused by the trial judge's further charge—not seasonably challenged at the trial as required under Rule 30, F.R. Crim. P.—that while persons actually removing the contents of the safe could not be guilty of "receiving" the same contents, the petitioner unquestionably did not have her hands

on the safe or actually remove the money and so could also be guilty of later receiving the money. It is not part of an instruction or verdict on larceny that the jury must find that a defendant did *not* also receive the money. There is no basis in the evidence, in logic, or in any legitimate conduct of a jury, for speculation that the finding of the jury that Virginia Miljanovich also received the money improperly affected the jury's conclusion as to her guilt of the larceny itself.

As against the speculation that the jury, if apprised that only one sentence could stand, might have chosen to find guilt of receiving and concealing rather than of aiding the larceny, it is to be noted that the maximum punishment for both offenses is the same. The verdict accordingly could in no way have been affected, for the jury would have no way of knowing what punishment the judge would impose. The judge, indeed, specifically instructed the jury, again without objection, that the matter of punishment was solely the responsibility of the trial judge and that the jury was to concern itself only with "the determination of the matters of fact" (R. 312).

B. There is no factual inconsistency or impossibility in the receiving and concealing of money by one whose prior relation to the money was not that of an actual possessor, but merely that of an individual who indirectly aided the actual taker. Accordingly, there was no reversible error in having allowed the jury to find the facts as to both offenses, regardless of what sentences might later be found proper. The petitioners' argument to the contrary, and the views of

the dissenting judge below, confuse the rationale of the common law rule as to the relationship between theft and receiving and the rationale of this Court's decision in *Heflin* v. *United States*, 358 U.S. 415. The common law rule, that a principal of the first degree in larceny could not also be the receiver, was based on the factual difficulty in finding that a person received something from himself. The rule was not extended further than its reason. Hence, at common law and in decisions that follow that rule, it was held that one who participated in the larceny only as an aider and abetter, but did not do the actual taking, could be convicted of both the larceny and the receiving. This is true, moreover, in decisions involving statutes making accessories guilty as principals.

This Court's decision in *Heflin* v. *United States*, 358 U.S. 415, was that Congress (specifically with reference to bank robbery) did not intend to impose separate punishment for the receipt and concealment of money by the thief, irrespective of whether logically this could or could not occur. We may accept, for the purposes of this case, the ruling of the court below that the *Heflin* rationale applies to the statute here involved and that a defendant may not be subjected to separate punishment for the theft and for receiving, but it does not follow from this ruling that the jury may not properly find the facts as to whether a person actually did both participate in the stealing and also receive the money. So long as the counts are not factually inconsistent—and even at common law it was recognized that they are not—the finding of one fact

in no sense precludes the finding of another, additional, fact supporting guilt.

Where the common law rationale of inconsistent offenses applies—*i.e.*, where it is factually impossible to commit both offenses, so that conviction for one must necessarily exclude the other—there is basis for saying that a jury should decide which of the two alternative offenses was actually committed. But where one act is not alternative to, but merely in addition to, the other, a jury has not failed to perform its function when it has determined that both acts have been committed. Whether the punishment imposed for the two acts is proper or improper is not a matter for the jury to decide, but for the court alone.

In the factual situation here presented, the receiving is in addition to, and not in exclusion of, liability for the taking. Hence, the jury could find that the petitioner committed both acts and the petitioner has achieved all that was her due when she has been held liable to only one punishment.

That a verdict on two counts, although a defendant can be sentenced on but one, does not invalidate a sentence proper under one is illustrated by this Court's decisions in *Prince* v. *United States*, 352 U.S. 322, 329 (holding that Congress did not intend separate punishment for entering a bank with intent to commit a felony and for the completed robbery) and *Heflin* v. *United States*, 358 U.S. 415 (holding that one sentenced for bank robbery could not be additionally punished for receiving). It is true that both cases arose on collateral attack, but in neither did the

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Court deem that the judgment was totally invalidated by the jury's finding of both aspects of the crime. It was considered sufficient simply to have the sentence corrected to eliminate the additional punishment. These decisions and the rulings of the courts of appeals preponderantly outweigh the decisions of several state courts cited in the dissent below, which are also in part distinguishable on particular factual and statutory grounds.

In the instant case, where the evidence disclosed and the jury found that petitioner Virginia Milanovich aided the larceny and at a later time received some of the stolen money, the judge by his sentence indicated that he thought a 10-year sentence for the larceny was justified. The fact that the petitioner went beyond the larceny and in addition received some of the stolen money is no reason for according her a new trial. The judge indicated his reason for imposing a 10-year sentence for the larceny on the wife as against 5 years for the husband for the same offense, and that reason was not the additional element of receiving in her case, for he imposed a separate 5-year sentence for that. The reason was the wife's record of "a life of crime" (*supra*, pp. 7–8).

II

The petitioners complain of the fact that, although the trial judge excluded the witnesses from the courtroom, he declined to instruct the witnesses not to discuss the case. The court of appeals below, without dissent on this issue, sustained the judgment as against this objection, relying upon the established

authority that even the exclusion of witnesses from the courtroom is a matter resting in the discretion of the trial judge, and, as stated by Judge Learned Hand, "*A fortiori* an instruction to them not to discuss the evidence while out of the courtroom is also discretionary." *United States* v. *Chiarella*, 184 F. 2d 903, 907 (C.A. 2), on rehearing vacated on other grounds, 187 F. 2d 12, remanded for resentencing, 341 U.S. 946.

The court of appeals below observed that ordinarily it would be proper for a trial judge to caution witnesses against comparing testimony, but that in the instant case no abuse of discretion by the trial judge appeared. Many of the 50 to 70 witnesses who were to testify had knowledge only as to minor portions of the case. As to the three accomplices—the only witnesses about whom the petitioners complain—in view of the fact that they were in custody, the possibilities of their communication as to details of their testimony were very limited. The little evidence of communications between them, fully explored on cross-examination, disclosed no significant comparison of testimony and no influencing of one by another. There was here much less possibility of prejudice than in *Holder* v. *United States*, 150 U.S. 91, where this Court sustained a conviction of murder although the witness had remained in the courtroom despite an order excluding witnesses. The court of appeals below was correct in its unanimous holding that the failure to give the admonition was not a ground for reversal of the convictions.

ARGUMENT

I

THE SENTENCE OF PETITIONER VIRGINIA MILANOVICH ON THE LARCENY COUNT WAS PROPERLY ALLOWED TO STAND

The first contention of the petitioners relates only to Virginia Milanovich. She was found guilty on both the larceny and the receiving counts, under a charge in which the judge made clear that the only reason she could be guilty of receiving was because the evidence was uncontradicted that she had not actually taken the money. The judge said (R. 304):

> Now, of course, if [petitioners] had actually removed the contents of the safe themselves, they cannot be guilty of receiving those same contents, but the evidence is clear in this case that neither [petitioner] actually had their hands on the safe or removed any money from any safe. There is no question about that. So, therefore, if they received any money—and I do not suggest to you that they did or did not receive any money—they must have received it from some other party, and then we go into the discussion of [intent]. * * *

The court of appeals, while adverting to the authorities holding that a person not the actual taker (*i.e.*, convicted of the theft only as an aider and abetter) can also be a receiver, nevertheless decided that this Court's decision in *Heflin* v. *United States*, 358 U.S. 415, rendered improper a conviction for both the theft and the receiving. The court therefore vacated the sentence on the receiving charge, as being inapplicable to one sentenced on the larceny charge.

Virginia Milanovich now contends that, in the absence of an instruction to the jury that it could not convict her of both larceny and receiving, she was prejudiced in that the jury was "deprived of its function to make the choice", and "might" have convicted her of receiving instead of larceny (Pet. 5; Pet. Br. 5–10).

It is the government's position that, upon the instructions given (to which, as to this aspect, the petitioner did not object), the jury indisputably found, by separate verdict, that Virginia Milanovich did the acts of aiding and abetting that made her guilty of larceny. This finding was not affected by the jury's additional finding that Virginia Milanovich also did acts that constituted receiving—even though this additional action, under the interpretation of the law made by the court of appeals, could not subject her to additional punishment beyond that applicable to the larceny.

The petitioner, and to some extent the court below, are in error in assuming that, if this Court's decision in *Heflin* v. *United States*, 358 U.S. 415, is accepted as applicable to the statute here involved, the jury could not properly convict of both the larceny and the receiving. As we understand the decision in *Heflin*, it does not hold that stealing and receiving are necessarily alternative acts—that, if one is committed, it is impossible to commit the other. The decision in *Heflin* holds only that Congress, in the particular statute there considered, did not intend to authorize punishment for both the theft and the receiving. Since the function of the jury is to find

the facts, and not to impose punishment, it was not error for the jury in the present case to find the facts both as to the theft and the receiving. And since the jury found that Virginia Milanovich did aid and abet the theft, she was properly punished for that crime.

A. SINCE THE JURY FOUND THAT VIRGINIA MILANOVICH COMMITTED ACTS WHICH MADE HER LIABLE TO PUNISMENT FOR LARCENY, SHE WAS PROPERLY PUNISHED FOR THAT CRIME

The jury was extensively and correctly instructed that, in order to find guilt of larceny, it must find certain facts as to aiding and abetting, intent, and the like (see the instructions, *supra*, pp. 6–7). These instructions were given in complete independence of the court's instructions as to receiving—and properly so. It is not part of an instruction or verdict on larceny that the jury must find that a defendant did *not* also receive the money. One aiding a larceny is guilty under the statute irrespective of whether that offender did or did not also receive some of the stolen property. It was upon these clear instructions as to larceny that the jury returned a separate verdict finding petitioner Virginia Milanovich guilty of larceny, and the evidence amply supports that finding. There is no basis in the evidence, in logic, or in any legitimate conduct of a jury, for speculation that the further finding of the jury that she also received the money improperly affected the jury's conclusion as to larceny.

Even if the possible maximum penalties for receiving were greater or less than those for larceny—actually they are the same (*supra*, p. 2)—the jury

could not properly color its finding of fact with consideration of matters of punishment which are outside its jurisdiction; and such tampering with factual findings could not legitimately be ascribed to a jury or presented as a right of which a defendant has been deprived. As stated by the judge to the jury, without challenge by petitioner (R. 312):

> May I say with respect to the question of any punishment which may be imposed upon either defendant in the event either defendant is found guilty, this is solely my responsibility. You are concerned only with the determination of the matters of fact and the issue that has been submitted to you for determination is whether or not these defendants or either of them are guilty of the offense or offenses which they are respectively charged with in the indictment. Your verdict will be in the nature of a report to the Court upon the truth of the charges here made, and when you have done this your responsibility as jurors will be at an end as far as this case is concerned. You, of course, are not concerned with the wisdom of the law or the method of the enforcement of the law.

And since the maximum punishment for both offenses is the same, even if the jury might have considered possible punishment, this could not have affected its verdict since it had no way of knowing what punishment the judge would impose.

Moreover, the petitioner did not, as required by Rule 30, F. R. Crim. P., object to the instructions submitting both the larceny and receiving counts to the jury, although she did contend that "as a matter

of law * * * the case should have been dismissed and a charge was not necessary" (R. 315). Since the petitioner's counsel was alert and energetic in objecting to other aspects of the instructions and since he repeatedly, during the trial, pointed out that a thief could not receive from himself (R. 15, 22, 231, 296–297), the failure to object cannot be ascribed to, or excused as, mere inadvertence. Under these circumstances it comes too late for the petitioner to contend that the jury should not have been allowed to find the facts as to both counts. And since the jury under explicit instructions clearly found that she was guilty of aiding and abetting the larceny, there is no reason why the sentence imposed upon a verdict so amply supported by the evidence should not be allowed to stand.

B. SINCE THERE IS NO FACTUAL INCONSISTENCY IN CONVICTIONS FOR BOTH AIDING AND ABETTING A LARCENY AND FOR RECEIVING, THERE WAS NO REVERSIBLE ERROR IN ALLOWING THE JURY TO FIND THE FACTS AS TO BOTH, REGARDLESS OF WHAT SENTENCE COULD ULTIMATELY BE IMPOSED

The petitioner's argument, and the views of the dissenting judge below, confuse the rationale of the common law rule as to the relationship between theft and receiving and the rationale of this Court's decision in *Heflin* v. *United States*, 358 U.S. 415. The common law rule, that a principal of the first degree in larceny could not also be the receiver, was based on the factual difficulty in finding that a person received something from himself. The rule was not extended further than its reason. Hence, at common law and in decisions that follow that rule, it was held that one

who participated in the larceny only as an aider and abettor, but did not do the actual taking, could be convicted of receiving. As stated in 2 Wharton, *Criminal Law and Procedure* (1957 ed.) 298, "a person who is physically present when the goods are stolen but who does not aid in their caption and asportation, may commit the offense of receiving the stolen goods [citing authorities], on the theory that the act of receiving the goods is under such circumstances subsequent to the theft and not a part of it [citing authorities]." See *Aaronson* v. *United States,* 175 F. 2d 41 (C.A. 4). See also *Weisberg* v. *United States,* 258 Fed. 284 (C.A.D.C.); *Bloch* v. *United States,* 261 Fed. 321, 325 (C.A. 5), certiorari denied, 253 U.S. 484; *Inman* v. *United States,* 243 F. 2d 256 (C.A.D.C.), certiorari denied, 358 U.S. 888; *State* v. *Rutledge,* 232 S.C. 223, 228–229; and the authorities collected in 136 A.L.R. 1100, *et. seq.,* to the effect that there can be guilt of receiving where the participant in the larceny was not present and assisting in the actual theft, notwithstanding statutes making accessories guilty as principals.

This Court's decision in *Heflin* v. *United States,* 358 U.S. 415, does not turn on any inherent conceptual difficulty in finding that the same person can logically commit both crimes; its holding rests on an interpretation of legislative intent. The Court held in *Heflin* that Congress (specifically with reference to bank robbery) did not intend to impose separate punishment for the receipt and concealment of money by the thief, irrespective of whether logically this could or co ld not occur. We may accept, for the purposes of this case, the ruling of the court below that the *Heflin*

rationale applies to the statute here involved and that a defendant may not be subjected to separate punishments for the theft and for receiving. It does not follow from this ruling that the finding of a jury that a person was guilty of both the stealing and the receipt of the money was reversible error. So long as the counts are not factually inconsistent—and even at common law it was recognized that they are not—the finding of guilt as to one offense in no sense precludes the finding of guilt of another.

Where the common law rationale of inconsistent offenses applies—*i.e.*, where it is logically impossible to commit both offenses, so that conviction for one must necessarily exclude the other—there is basis for saying that a jury must decide which of the two alternative offenses was actually committed. If it is impossible to be both actual taker of the money and receiver, then it is the function of a jury to determine whether a particular defendant is one or the other—taker or receiver. But where one act is not alternative, but merely in addition, to the other, a jury finding that both exist has done nothing inconsistent but has merely determined that both acts have been committed. Whether the punishment imposed for the two acts is proper or improper is not a matter for the jury to decide, but for the court alone.

The distinction which we have suggested was recognized by the Massachusetts courts with respect to the case on which petitioner primarily relies, *i.e.*, *Commonwealth* v. *Haskins*, 128 Mass. 60. Haskins and another were charged with larceny of a cow and with receiving the same cow, knowing it to have been stolen.

The jury was specially instructed that there was no evidence to support the charge of receiving, but the jury returned a verdict of guilt upon both counts. The district attorney was granted leave to enter a *nolle prosequi* as to the second charge over the defendants' objections. The judgment was reversed upon appeal on the ground that the finding of both offenses was inconsistent in law and conclusive of a mistrial (128 Mass. 61). When, however, the Massachusetts court in *Commonwealth* v. *Lowrey*, 158 Mass. 18, was confronted with a verdict of guilty for both burglary and larceny, it sustained the action of the trial judge in directing acquittal on the larceny count. The court, in an opinion by Holmes, J., adverted to the requirement in *Haskins, supra,* that the jury must decide between inconsistent counts, but considered the particular counts before it not to be inconsistent.[*] In short, whatever may be the merit in a holding that a jury must make the ultimate choice between factually inconsistent counts,[*] there is no requirement that the jury make a choice where a verdict on one of two counts finds an *additional* fact supporting guilt even though the additional fact may not justify an addi-

[*] Even where there have been convictions for both actual theft and for receiving, courts have considered it sufficient merely to set aside the sentence for receiving. *People* v. *Daghita*, 301 N.Y. 223, 228. See also comments of the Florida court, *Goodwin* v. *State*, 157 Fla. 751, 752, on *Bargesser* v. *State*, 95 Fla. 404, which was one of the cases mentioned in the dissenting opinion below; and opinion of the Illinois Court in *People* v. *Carr*, 255 Ill. 203, distinguishing *Tobin* v. *People*, 104 Ill. 565, cited in the dissent below. Consistency in verdicts has never been deemed a requirement in the federal courts. *Dunn* v. *United States*, 284 U.S. 390.

tional sentence. All that is required is that there be only one sentence.

The principle for which we contend is well illustrated by the decisions relating to the aggravated offense of bank robbery. Under the bank robbery statute, it has been held that the provision for increased punishment when life is put in danger does not define a separate offense, but defines merely an aggravated form of the offense of bank robbery. *Holiday* v. *Johnston*, 313 U.S. 342, 349. Where the aggravated form of the offense is charged, a jury must find two elements—that the defendant committed the robbery and that in the course thereof he put life in jeopardy. The offense remains single whether these elements are charged in one count or two. There is value in charging the two elements of the one crime in separate counts since this serves to direct the jury's attention to the necessity of considering each element separately, and gives specificity to the verdict. But, whether the offense is charged in one count or two, the fact remains that two elements must be found although only one punishment may be imposed. Since the jury has to find both elements, there clearly would be no basis for ordering a new trial where the jury found both elements in the form of a verdict on two separate counts, even though (as sometimes has happened) a court erroneously imposed sentences on each of the counts. Rather, since the error lies, not in the jury's finding both facts, but in the court's imposing two sentences, the courts have corrected the error by eliminating the lesser of the sentences. This has occurred whether the question arose on direct appeal

or collateral attack. *E.g., O'Keith* v. *United States,* 158 F. 2d 591 (C.A. 5); *Remine* v. *United States,* 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862; *United States* v. *Di Canio,* 245 F. 2d 713 (C.A. 2), certiorari denied, 355 U.S. 874; *Lowe* v. *United States,* 257 F. 2d 409 (C.A. 6).

Essentially the same situation is presented here with respect to the function of the court and jury. It is true that a jury does not, as in the aggravated bank robbery cases, have to find two elements (that the defendant both participated in the theft and received the money). But where, as in this case, the jury has actually done so, the function of the appellate court is the same as in the bank robbery situation. Only one punishment can be imposed whether there is one offense (abetting the taking) or two (abetting the taking, and receiving). But the fact that only one punishment can be imposed does not mean that it was error for the jury to find, and to be permitted to find, guilt of both offenses. As we have pointed out, there is no logical difficulty in finding that one person aided and abetted a larceny and also received the money. The two crimes are not alternatives, even though only one punishment may be imposed. In the factual situation here presented the receiving is in addition to, and not in exclusion of, liability for the taking. Hence, the jury could properly find that the petitioner committed both aspects of the crime and the petitioner has achieved all that was her due when she has been held liable to only one punishment.

That an additional verdict on a second count does not totally invalidate the sentence is likewise illus-

trated by this Court's decisions in *Prince* v. *United States,* 352 U.S. 322, 329 (holding that Congress did not intend separate punishment for entering a bank with intent to commit a felony and for the completed robbery) and *Heflin* v. *United States,* 358 U.S. 415 (holding that one sentenced for bank robbery could not be additionally punished for receiving). It is true that both cases arose on collateral attack, but in neither did the Court deem that the judgment was totally invalidated because the jury found both aspects of the crime. It was deemed sufficient simply to have the sentence corrected to eliminate the additional punishment.

Lower courts, after the *Prince* decision, were confronted with the situation where a defendant had been given a longer sentence on a count charging entry into a bank with intent to commit a felony (subject to a maximum of 20 years) than on another count charging a completed larceny (subject to a maximum of 10 years). The defendants in such cases sought to have the sentence for entry set aside on the theory that the entry merged into the completed larceny. The courts refused to accede to these claims, holding that since the two counts related to one offense the longer of the two sentences could stand. *Purdom* v. *United States,* 249 F. 2d 822, 826 (C.A. 10), certiorari denied, 355 U.S. 913; *United States* v. *Williamson,* 255 F. 2d 512 (C.A. 5), certiorari denied, 358 U.S. 941; *United States* v. *Leather,* 271 F. 2d 80 (C.A. 7), certiorari denied, 363 U.S. 831; *Audett* v. *United States,* 265 F. 2d 837 (C.A. 9), certiorari denied, 361 U.S. 815. In the *Audett*

case, where concurrent sentences of 20 years and 10 years had been imposed respectively on counts for the entering of the bank and for the robbery, the court of appeals said, "The trial judge, by imposing the maximum sentence on Count I and allowing the sentence on Count II to run concurrently, indicated that he intended the maximum sentence to be twenty years. * * * In these circumstances the policy to be followed is to vacate the lower sentence on the second count."

In this case, where the jury explicitly found that petitioner Virginia Milanovich both aided and abetted the larceny and received the stolen money, the judge by his sentence indicated that he thought a 10-year sentence was justified. The judge explicitly explained why he imposed a ten-year sentence for the larceny on the wife as against five years for the husband on the same count. His reason was that, in contrast to the husband's record, the wife's revealed a life of crime (see *supra*, pp. 7–8).

II

NO ABUSE OF DISCRETION WAS INVOLVED IN THE TRIAL JUDGE'S REFUSAL TO INSTRUCT WITNESSES NOT TO DISCUSS THE CASE

The petitioners complain of the fact that, although the trial judge excluded the witnesses from the courtroom, he declined to instruct the witnesses not to discuss the case. The court of appeals below, without dissent, sustained the judgment as against this objection, relying upon the established authority that even the exclusion of witnesses from the courtroom

is a matter resting in the discretion of the trial judge.[5] As stated by Judge Learned Hand, "*A fortiori* an instruction to them not to discuss the evidence while out of the courtroom is also discretionary." *United States* v. *Chiarella*, 184 F. 2d 903, 907 (C.A. 2), on rehearing vacated on other grounds, 187 F. 2d 12, remanded for resentencing, 341 U.S. 946. And see *United States* v. *White*, 28 Fed. Cas. 550, 551 (No. 16,675), 5 Cr., C.C., 38.

The court of appeals below observed that ordinarily it would seem proper for a trial judge to caution witnesses against comparing testimony, but that in the instant case no abuse of discretion by the trial judge appeared. The trial judge, while willing to exclude the witnesses from the courtroom, clearly feared that admonitions to the witnesses concerning their conversations outside the courtroom would merely draw down upon him a host of delaying collateral inquiries of hopelessly inconclusive nature. In all, there were 50 to 70 witnesses[6] who were to testify, many of them only as to minor portions of the case. As to the

[5] With respect to the discretionary nature of the decision to exclude witnesses from the courtroom, see *Holder* v. *United States*, 150 U.S. 91, 92; *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702; *United States* v. *Postma*, 242 F. 2d 488, 493–494 (C.A. 2), certiorari denied, 354 U.S. 922; *Johnston* v. *United States*, 260 F. 2d 345, 347 (C.A. 10), certiorari denied, 360 U.S. 935; *Gates* v. *United States*, 122 F. 2d 571, 577 (C.A. 10), certiorari denied, 314 U.S. 698; *United States* v. *Cases, etc.*, 179 F. 2d 519, 522 (C.A. 2), certiorari denied, 339 U.S. 963.

[6] In addition to the counts presently involved, there were two other counts relating to a distinct theft.

three accomplices—the only witnesses about whom petitioners complain—in view of the fact that they were in jail, the possibilities of their communication as to details of their testimony were very limited. Guerrieri testified on cross-examination that, after his testimony the day before, he and Grimmer left together and were brought to court together (R. 108), but since they were under guard there was little possibility for matching of testimony. Sofocleous, who was Guerrieri's brother-in-law, talked with Guerrieri, but testified that his talk was not about the case (R. 137).[7] Grimmer confirmed that he and Guerrieri had sent notes in jail and that they had talked on the way to the trial (R. 226). He said that after the case had started they had talked "somewhat" about the case (R. 226). Grimmer had also talked to his wife after she testified (R. 215–216), but since she testified to threats to her after Grimmer was in jail (R. 65), whereas he testified to the theft, there could be no dovetailing of testimony.

The trial judge believed that the matter of communication between witnesses could better be handled by cross-examination than by giving an admonition that might not be properly understood and might give rise to collateral motions. His exercise of discretion in that respect resulted in no prejudice to petitioners. The court below, therefore, properly found that the failure to give the admonition did not require

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[7] Sofocleous testified that he discussed the case before he (Sofocleous) was sentenced (R. 142). This was before the present trial and has no bearing on the effect of any admonition by the judge or lack of it.

reversal of the convictions. There was here much less possibility of prejudice than in *Holder* v. *United States, supra*, 150 U.S. 91, where this Court sustained a conviction of murder although the witness had remained in the courtroom despite an order excluding witnesses.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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DECEMBER 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1960.

Mike Milanovich et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[March 20, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners are husband and wife. They were both convicted in a Federal District Court for stealing several thousand dollars in currency from a commissary store at a United States Naval Base. The wife was convicted also on a separate count for receiving and concealing the stolen currency.[1] Both petitioners were sentenced to prison on the larceny conviction, the husband for a term of five years, and the wife for a ten-year term. In addition, the wife received a five-year concurrent sentence on the receiving count.

[1] The statute under which the petitioners were convicted is 18 U. S. C. § 641. It provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Throughout the trial counsel for the petitioners consistently maintained the position that a thief could not be convicted of receiving from himself.[2] Although directing an acquittal on the receiving count in the husband's case, the trial judge overruled a similar motion on behalf of the wife. Counsel then clearly indicated his intention to request that the jury be instructed that it could not find the wife guilty of both stealing and receiving.[3] The trial judge responded by pointing out that the Fourth Circuit had decided, in *Aaronson* v. *United States*, 175 F. 2d 41, that "it is possible that as long as the person did not actually participate in the actual taking of the goods, that same person may be found guilty of receiving and concealing and may also be found guilty as an accessory before the fact or as an aider and an abetter of the actual charge of theft." Faced with this controlling Fourth Circuit authority, counsel did not engage in the futile exercise of submitting a more formal request for such instructions.

When the case reached the Court of Appeals, that court put aside its decision in the *Aaronson* case, in the light of this Court's decision in *Heflin* v. *United States*, 358 U. S. 415, which had been announced in the meantime. In *Heflin* we held that a defendant could not be convicted and cumulatively sentenced under 18 U. S. C. § 2113 for both robbing a bank and receiving the proceeds of the robbery. Relying on that decision, the

[2] "[W]e feel, sir—for the jury to be considering both receiving and stealing—that both charges are inconsistent and if the evidence is to be believed that these people are participants, then they cannot be guilty of receiving, and if they are guilty of receiving, they cannot be guilty of participating."

[3] "Your Honor, we will ask the Court to instruct the jury that inasmuch as they are inconsistent counts that they can only come back, if they come back with a verdict of guilty, as to one of the other, but not both."

court set aside the sentence imposed upon the wife for receiving. 275 F. 2d 716. It was the court's view that "in the absence of a contrary indication by Congress, a defendant charged with offenses under statutes of this character may not be convicted and punished for stealing and also for receiving the same goods." 275 F. 2d, at 719. Although *Heflin* involved a different section of the criminal code, the court found "no differences between the two statutes or their legislative histories justifying divergent interpretations in respect to the issue before us."

In this view we think that the Court of Appeals was correct. As the court recognized, th · question is one of statutory construction, not of common law distinctions. Compare, *Metcalf* v. *State*, 98 Fla. 457, 124 So. 427; *Smith* v. *State*, 59 Ohio St. 350, 52 N. E. 826; *Jenkins* v. *State*, 62 Wis. 49, 21 N. W. 232; *Regina* v. *Hilton*, Bell C. C. 20, 169 Eng. Reprint 1150, with *Allen* v. *State*, 76 Tex. Crim. Rep. 416, 175 S. W. 700; *Regina* v. *Perkins*, 2 Den. C. C. 458, 169 Eng. Reprint 582; *Regina* v. *Coggins*, 12 Cox C. C. 517. With respect to the receiving statute before us in *Heflin*, we decided that "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the . . . robbers themselves," 358 U. S., at 420. We find nothing in the language or history of the present statute which leads to a different conclusion here. As in *Heflin*, the provision of the statute which makes receiving an offense came into the law later than the provision relating to robbery.[4]

It is now contended that setting aside the sentence on the receiving count was not enough—that the conviction on the larceny count must also be reversed, and the case

[4] The paragraph making it an offense to steal government property had its genesis in the Act of March 2, 1863, c. 67, 12 Stat. 696, 698. The paragraph as to receivers originated in the Act of March 3, 1875, c. 144, § 2, 18 Stat. 479.

remanded for a new trial. The argument is that although the evidence was sufficient to support a conviction for either larceny or receiving,[5] the judge should have instructed the jury that a guilty verdict could be returned upon either count but not both. It is urged that since it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed, a new trial is in order. This was the view of Chief Judge Sobeloff, dissenting in the Court of Appeals. 275 F. 2d, at 721.

We think that the point is well taken. In *Heflin* we were not concerned with the correctness of jury instructions, since that case arose out of a collateral proceeding to correct an illegal sentence where the petitioner was asking only that the cumulative punishment imposed for receiving be set aside. In this case, by contrast, a direct review of the conviction brings here the entire record of the trial. We hold, based on what has been said as to the scope of the applicable statute, that the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both.

Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed upon the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus we cannot say that the mere setting aside

[5] It is acknowledged here that the evidence was sufficient to support a jury finding that both petitioners aided and abetted the larceny, and thus were guilty as principals under 18 U. S. C. § 2. It is also conceded that the evidence was sufficient to support the wife's conviction for receiving and concealing the stolen property (a substantial amount of silver currency having been found in a suitcase in her home two weeks after the robbery).

of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict of guilt on the larceny count, and that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

We find no merit in the petitioners' argument as to the trial court's conduct with respect to cautionary instructions to the witnesses for the Government. Accordingly, the judgment as to Mike Milanovich is affirmed. For the reasons stated, the judgment as to Virginia Milanovich is set aside, and her case remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1960.

Mike Milanovich et al., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[March 20, 1961.]

Mr. Justice Frankfurter, whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker join, dissenting.

This is a prosecution brought under 18 U. S. C. § 641[1] upon an indictment containing several counts. One charged the defendant, petitioner herein, with the theft of government property; another charged her with receiving the stolen property with an intent to convert it to her own use. Both counts were allowed to go to the jury which explicitly found the defendant guilty on each of the two counts.

This was the evidence on which the jury must have based their verdict against the defendant. She and her husband, as owners of an automobile, transported three

[1] "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof, or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

others under an arrangement whereby the three were to break into a United States naval commissary building with a view to stealing government funds. Defendant and her husband were to remain outside for the return of their accomplices after the accomplishment of the theft. In fact, for one reason or another, husband and wife drove off without awaiting the return of their friends. Not finding the automobile where they had left it, the thieves buried the booty. No share of the stolen money ever touched the hand of petitioner or was in any sense received by her until seventeen days later when, after she had removed some of the booty from the base, it was soon after discovered by FBI agents during a legal search of the premises. Since she herself was not an active participant in the breaking in and thieving, she was amenable to § 641 because she, as an accessory, was legally deemed a principal under 18 U. S. C. § 2.[2] On this basis the trial judge committed the case to the jury and the jury was enabled to find her guilty of the substantive offense of stealing government property, as well as to return a verdict of guilty on the receiving charge. The trial judge then sentenced the defendant on each of the counts. Because of the extensive criminal record of the defendant, he imposed a sentence of ten years on the thieving count and five years on the receiving count, the sentences to run concurrently.

The Court of Appeals, drawing on our decision in *Heflin* v. *United States*, 358 U. S. 415, deemed it necessary to set aside the sentence imposed on the receiving count. It read *Heflin* as holding that the crime of re-

[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

ceiving was solely directed to those who were not convicted of stealing; the latter conviction was therefore invalidated. The Court, likewise relying on *Heflin*, today holds that since the jury should have been instructed that they had power to return a verdict of guilty on only one count, the proceedings against the defendant must start all over again, since a reviewing court cannot predict what the jury would have done under proper instructions.

Both of these conclusions rest, I believe, on a wholly unwarranted reliance on *Heflin*. They disregard the only issue that was before the Court in that case, and thereby misconceive its holding. Today's decision reflects the common-law doctrine of merger and the consequences of such merger on the requirements of criminal procedure—specifically, what separate counts may be laid in an indictment and the duty of a trial judge in charging the jury the kind of a verdict they may return to an indictment of multiple counts.

It is hornbook law that a thief cannot be charged with committing two offenses—that is, stealing and receiving the goods he has stolen. *E. g., Cartwright* v. *United States*, 146 F. 2d 133; *State* v. *Tindall*, 213 S. C. 484, 50 S. E. 2d 188; see 2 Wharton, Criminal Law and Procedure, § 576; 136 A. L. R. 1087. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving as a contemporaneous—indeed a coincidental—phenomenon, constitute one transaction in life and, therefore, not two transactions in law. It also may well be that a person who does not himself take but is a contemporaneous participant as an aider and abettor in the taking is also a participant in a single transaction and therefore has committed but a single offense. *Regina* v. *Coggins*, 12 Cox C. C. 517; *Regina* v. *Perkins*, 2 Den. C. C. 458, 169 Eng.

Rep. 582; *Rex* v. *Owen*, 1 Moody C. C. 96, 168 Eng. Rep. 1200. In such a case, the jury must be told that the taking and receiving, being but a single transaction, constitute, of course, only one crime. See *Commonwealth* v. *Haskins*, 128 Mass. 60. (This, of course, does not bar Congress from outlawing and punishing as separate offenses the severable ingredients of one compound transaction. See *Gore* v. *United States*, 357 U. S. 386.)

The case before us presents a totally different situation—not a coincidental or even a contemporaneous transaction, in the loosest conception of contemporaneity. Here we have two clearly severed transactions. The case against the defendant—and the only case—presented two behaviors or transactions by defendant clearly and decisively separated in time and in will. The intervening seventeen days between defendant's accessorial share in the theft and her conduct as a recipient left the amplest opportunities for events outside her control to frustrate her hope of sharing in the booty, or ample time for her to change her criminal purpose and avail herself of a *locus poenitentiae*. Two larcenies, separated in time, would not be merged; what legal difference between the two situations here?

It surely is fair to say that in the common understanding of men such disjointed and discontinuous behaviors by Mrs. Milanovich—(1) bringing thieves to the scene of their projected crime and departing without further ado before the theft had been perpetrated, and (2) taking possession seventeen days later of part of the booty—cannot be regarded as a single, merged transaction in any intelligible use of English. And that which makes no sense to the common understanding surely is not required by any fictive notions of law or even by the most sentimental attitude toward criminals. I venture to believe that not a single case concerned with a situation comparable to that now before the Court can be found in the

law reports of England, of any of the States of this country, or of the federal courts, in which it was held or suggested that two disjointed, decisively separated manifestations of conduct constitute as a matter of law a single, fused transaction. An ample canvass of the reports has certainly not revealed the existence of such a case, and one reads the opinion of the Court in vain to find a suggestion that any such precedent is available.

One can say with confidence that *Heflin* is no warrant for the conclusion pronounced by the Court. There was not the remotest suggestion in the petition that brought that case here, in the briefs that were submitted before argument, in the oral argument, or in the opinion which formulated the decision, that the case was concerned with the power of the court to submit the several counts to the jury and the right of the jury to convict on separate counts for conduct charging separate transactions clearly separated in fact. In *Heflin*, the jury convicted defendant on separate counts of bank robbery and receiving stolen money. We held that we could find "no purpose of Congress to pyramid penalties for lesser offenses following the robbery," and therefore ruled against the cumulation of punishments, but found no impropriety in submitting both counts to the jury. I find not a word, not a hint, not a subtle innuendo suggesting that the case dealt with criminal procedure—that is, with submission of different counts to a jury, with the appropriateness of the judge's charge to the jury, or with the right of a jury to bring in separate verdicts on separate counts on the basis of evidence justifying such submission and such verdicts.

Heflin is one of a recent series of cases having to do with what the Court in *Prince* v. *United States*, 352 U. S. 322, 325, called "fragmentation of crimes for purposes of punishment." Beginning with *Bell* v. *United States*, 349 U. S. 81, these cases concerned the propriety of cumula-

tive sentences within different statutory frameworks.[3] "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . [when] Congress does not fix the punishment for a federal offense clearly and without ambiguity. . . ." *Bell* v. *United States*, *supra*, at 83–84. In not one of these cases will there be found a word having to do with how crimes should be charged, how submitted to the jury, or what verdicts the jury may return. *Heflin*, like the rest of these cases, was concerned with the duty of the trial judge in sentencing after the jury was through with its job. Indeed, in all these cases, there were several counts on which the jury found a verdict and the issue arose not as to the propriety of leaving all the counts to the jury, but what sentence should be imposed after the verdict had been returned.

To draw from *Heflin* the doctrine that an aider and abettor to a theft who at an appreciably later time receives some of the stolen goods may not be charged on

[3] In *Bell*, the defendant plead guilty to an indictment under the Mann Act which charged him in two counts with transporting two women, respectively, for immoral purposes on one trip. This Court held that Congress did not intend to make "simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported." 349 U. S., at 82–83.

In *Prince*, two counts of an indictment charging, respectively, entering a bank with intent to rob and robbery were submitted to the jury, which returned verdicts of guilty on both. The Court held that the sentences could not be cumulated and remanded the case to the District Court for resentencing, but made no reference to the fact that two counts were laid and found by the jury.

In *Callanan* v. *United States*, 364 U. S. 587, defendant was convicted on separate counts for conspiracy and extortion. In view of the historic distinctiveness of a conspiracy from the substantive offense which is its object, we held that Congress had made allowable consecutive sentences under the applicable statute.

separate counts for both transactions, or that a judge may not leave both counts for a jury verdict of guilt on either one or both, when no such question was in issue or adverted to in *Heflin*, is to disregard the whole philosophy of our law based on precedents. It is to base reliance on a case for a new doctrine when that case affords no sustenance for it.

I agree with the District Court in the imposition of two sentences to run concurrently.[1]

[1] I agree with this Court that the husband's claim of trial error is without merit.

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1960.

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[March 20, 1961.]

Mr. Justice Clark, whom Mr. Justice Whittaker joins, dissenting.

My duty here is to help fashion rules which will assure that every person charged with an offense receives a fair and impartial trial. But that obligation does not require my ferreting out of the record technical grounds for reversing a particular conviction, grounds which could not possibly have affected the jury's verdict of guilt as a factual determination. If the Government perseveres, the Court's order contemplates a new trial for one of five safecrackers who beyond any evidentiary doubt is guilty of aiding and abetting in looting a government safe of about $14,000, and of thereafter receiving part of the proceeds. The case was tried before a jury for 10 days with scrupulous adherence to proper procedure. Judge Hoffman gave a clear and, I think, correct charge to which petitioner made no objection on the ground upon which the Court now bases its reversal. Nor did petitioner offer a proposed instruction covering that issue. Furthermore, the motion for new trial, as set forth in the record, urged no such ground as error. Nonetheless, the Court reverses saying that "counsel for petitioners consistently maintained the position" throughout the trial "that a thief could not be convicted of receiving from himself." Judge Hoffman did not try the case, nor was it submitted to the jury, on that theory. The record shows, as my Brother Frankfurter points

out, that beyond question Mrs. Milanovich took no part in the actual physical looting of the safe, and first received any of the stolen money more than two weeks later, not from herself, but from where the safecrackers had buried it. It was on that theory, to which petitioners made no objection, that Judge Hoffman submitted the case to the jury.

With all deference I must point out that in support of its view the Court has quoted merely an excerpt from a statement of petitioner's counsel *ante*, p. —, n. 2, made in chambers on his motion to require the United States Attorney to elect as between the two counts of aiding and abetting, and receiving. Admittedly, this motion was not well taken. However, during that presentation counsel stated: "we *will* ask the Court to instruct the jury" that it cannot find petitioners guilty on both counts. But, after the motion to elect was denied, no such instruction was offered nor was there made on that ground any objection to the charge omitting such instruction. Now petitioners have chosen to abandon a claim of error in the denial of their motion to elect, and rely instead upon error in the charge, although no objection had been made on that ground.

Moreover, the charge as given could not possibly have prejudiced Mrs. Milanovich on sentence. She was found guilty both of aiding and abetting, and of thereafter receiving part of the stolen loot. She now stands, after the action of the Court of Appeals, sentenced only on the aiding and abetting count. Each count carried the same possible penalty, and, even if the case had been submitted to the jury as is now required, it seems rather unreal for us to consider as anything more than so remotely possible as to be highly improbable, that in sentencing petitioner on the single count the trial judge, who would nonetheless have heard all the evidence on both counts, would be more

likely to impose a lesser sentence than the 10 years already given.

The Court does not mention the dilemma which its ruling produces. It says the jury should have been instructed that a guilty verdict could be returned on either count, but not both. This would require the jury to return a not guilty verdict on one count. Here, where the jury had in fact found Mrs. Milanovich guilty of both offenses, it could yet be required to return a false verdict, *i. e.*, false in fact even if true in law, on one of them. Except for its imperfect analogy to the case of factually inconsistent counts charging lesser-included offenses of the main count (as in first degree murder), in which the trial judge gives the jury instructions to be applied successively, the rule suggested today is unheard of in our jurisprudence. For here the jury is invited to consider counts not factually inconsistent, and in such sequence as it chooses, with no more reason to convict on one rather than another except its election on how to characterize the grounds supporting petitioner's imprisonment. Since such a result is required by the present disposition, it would have been better to rule that the prosecutor must elect between the counts, as petitioner originally wished.

As I see the case, however, the jury could not on the evidence here have found the petitioner not guilty, as a matter of fact, on the aiding and abetting count, and guilty on the receiving one. To be guilty of receiving she must have had knowledge of the stolen character of the money taken from the safe. In this case the only means through which the fact of this requisite knowledge was demonstrated was the clear and convincing proof given by her partners in the crime whose testimony beyond any peradventure proved her guilty of both offenses. How, I ask, could she have been harmed by the jury finding her guilty of both offenses rather than choosing between the two?

To me it is clear that where the evidence is sufficient the jury should be left free, as it always has been, to find the fact of guilt. If in law the verdicts so found, although proper determinations of fact, are not all enforceable, the dilemma is adequately resolved by requiring the trial judge to forego sentencing on the unenforceable verdicts.

For these reasons, and those of my Brother FRANKFURTER, whom I join, I dissent.